No. 698.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WILLIAM WOLFF,

Plaintiff in Error,

v.

WELLS, FARGO AND COMPANY, A CORPORATION,

Defendant in Error.

Reply Brief for Defendant in Error.

E. S. PILLSBURY,
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Filed this.....day of December, 1901.

.....
Clerk.

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In our Opening Brief we have fully considered all the specifications of errors assigned by the plaintiff in error. By the judgment in this action the defendant in error was awarded certain rights which it claimed under a contract made between it and the plaintiff in error. These rights would never have been questioned or denied by the plaintiff in error, had not the article, which was the subject of the contract, risen in price in the open

market before the full quantity, agreed upon and required by the defendant in error, had been delivered by the plaintiff in error.

In the first place, we contended that, inasmuch as the parties to this action stipulated that the same should be tried by the court without a jury, they bound themselves to accept as conclusive the facts found by the trial court. To this well settled rule the plaintiff in error seeks to make the present case an exception. He says (Reply Brief, p. 2): "On both those occasions, as well as now, we pointedly maintained that there was no evidence to sustain certain special findings * * *." If it were true that there was an entire absence of evidence to support certain special findings, as claimed, then this contention would be sound. But, assuming that the letter of September 24th, 1897, is the only evidence to support these findings, its very existence in the record is sufficient to entirely overcome the statement that there is a complete want of evidence. The cases of **King v. Smith**, 110 Fed. 95, and **Dooley v. Pease**, 180 U. S. 126, cited by plaintiff in error, but reaffirm the rule that it is only when there is an **entire want** of evidence upon which to base a fact, that the findings of the trial court will not be regarded as conclusive.

In **King v. Smith**, supra, this Honorable Court said:

> "The finding that the plaintiff in the action is the owner and entitled to the possession of the property described in the complaint is clearly a general finding of the ultimate facts of ownership and right of possession, and is **conclusive here, unless there was entire want of evidence upon which to base it.**"

In **Hathaway v. First Nat. B'k,** 134 U. S. 494, the Supreme Court said, at page 498:

> "The first three assignments of error allege errors merely in the findings of fact by the court. **Those errors are not subject to revision by this court, if there was any evidence upon which such findings could be made.**"

It is now well settled that when parties stipulate to try a case before the court without a jury, they bind themselves to accept as conclusive the findings by the court of the ultimate facts. In **Dooley v. Pease,** 180 U. S. 126, the Supreme Court said that, where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, **it matters not how convincing the argument that upon the evidence the findings should have been different.**

The defendant in error believes that it is justified in earnestly and respectfully urging the application to the case at bar of the rule regarding the conclusive character of the findings of the ultimate facts. It is endeavoring to preserve certain rights secured to it under a contract fairly and deliberately entered into between it and the plaintiff in error. Of these rights the plaintiff in error is seeking to deprive it by a strained and unwarranted construction of the language of a writing, the obligations of which he is trying to avoid, because to have carried them out would have caused him a financial loss—a construction, we may add, which is entirely unsupported by precedent or authority.

We next contended in our Opening Brief that no error was committed in the admission or rejection of certain evidence. The questions of law presented by specifications of error 1, 2, 3, 4, 5, 6 and 7, and which relate to the evidence, we have endeavored to present in subdivisions II, IV, V and VII of our Opening Brief. Plaintiff in error in his Reply Brief (p. 2) says that he will adopt our statement, that the trial court did not regard as material or relevant the testimony, which was objected to. On page 6 of the Reply Brief it is said: "* * * it inevitably follows that the Court did not regard the previous conversation as material or relevant to the matter in hand. The Court, apparently, reached its own interpretation by a process of reasoning based on the terms of the writing alone" etc. If the objectionable evidence was not considered by the Court below, then, we again respectfully submit, as pointed out in subdivision VII of our Opening Brief, that the judgment should not be reversed. Plaintiff in error argues that parol evidence cannot be introduced to vary the terms of a written instrument. **Reed v. Ins. Co.**, 95 U. S. 23, and thirteen other cases, are cited in support of this contention. The rule, however, has no application to the facts of the case at bar. To our contention that the evidence of the conversation was properly admitted, because the writing itself refers to the conversation, plaintiff in error has made no reply. In support of this contention we cited several cases on pages 4 and 5 of our Opening Brief. Plaintiff in error has attempted to show that these cases are inapplicable, by pointing out a distinction between the facts of each case and those of the case at bar. In

each of the cases, however, the essential feature—the reference to a conversation in a writing,—is present, and for that reason each one of those cases is pertinent. Moreover, they amply sustain the ruling of the trial court. **Godkin v. Monahan,** 83 Fed. 116, cited on page 12 of the Reply Brief of plaintiff in error, and **N. W. Fuel Co. v. Bruns,** 45 N. W. 669, and the other cases cited on pages 14 and 15, merely reaffirm the rule that parol evidence cannot vary the absolute terms of a written contract.

So far as the letter of September 24th, 1897, is concerned, plaintiff in error in his Reply Brief has **not cited a single authority** in support of the construction which he is seeking to give this letter. He says (**Reply Brief,** p. 24): "We think the writing readily and fairly comes under the second general rule of the **Brawley** case." The second general rule stated by Mr. Justice Bradley is as follows:

> "**But when no such independent circumstances are referred** to, and the engagement is to furnish goods of a certain quality or character to a certain amount, the quantity specified is material, and governs the contract. The addition of the qualifying words 'about,' 'more or less,' and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight."

Applying the test of this rule to the letter in the case at bar, we find that the letter lacks the first vital and essential feature to bring it within the conditions of the

rule. Independent circumstances are referred to in the letter, and those independent circumstances are the construction of a new building and the supply of the cement that may be required therefor. The letter, therefore, cannot be classed under the second general rule.

On the other hand, we contend that the cases of **Brawley v. United States**, 96 U. S. 168, and **Budge v. United Smelting & Refining Co.**, 104 Fed. 498, and the other cases cited by us under subdivision III of our Opening Brief, conclusively establish that the letter of September 24th, 1897, was a contract to furnish as much cement as the defendant in error should require for use in its building. The letter submits a quotation on Alsen's German Portland Cement for use in a new building then in course of construction. It names a price for what may be required, on about 5,000 barrels, more or less, of $2.56 per barrel, delivered at the building site. In the language of this Honorable Court in the **Budge** case, the contract was

> "one of those in which the contracting parties had in mind the construction of a particular work, and the supply of the necessary material therefor, the work itself furnishing to both parties the ultimate measure of the quantity which the contract contemplated."

The case of the "miller" instanced by Mr. Justice Bradley to illustrate the third general rule stated by him in the **Brawley** case, and quoted by us on page 20 of our Opening Brief, precisely covers the case at bar.

It is clear that the substantial engagement was to furnish as much cement as should be required for use

in the new Wells, Fargo and Company Building, and that the quantity designated, 5,000 barrels, is to be regarded merely as an estimate of what, at the time, the plaintiff in error supposed might be required. The argument with reference to change of plans and bad faith on the part of the defendant in error is, we respectfully submit, entirely out of place. Had there been any change in the plans or had the defendant been guilty of bad faith, the plaintiff in error could, in his answer, have made such change of plans and bad faith a special defense. But there is not even a hint or a suggestion of either in the entire record.

To the remarks of plaintiff in error that we have pursued an "obnoxious course" (Reply Brief, p. 16), we deem it unnecessary to reply, because beyond the mere general charge, no instance of our wrong-doing is cited. But we do most earnestly and emphatically maintain and respectfully submit and contend, that when a merchant contracts to sell an article of merchandise at a given figure, he will not be permitted to avoid the obligations of his contract because, before the contract is completed, the price of the article he has contracted to deliver has risen in the market. As the learned judge of the Court below, in delivering his opinion, very properly remarked:

> "Mr. Wolff thought it would be profitable to secure a contract to sell the cement required for this building. The contract was made. He agreed to deliver the cement, and to this he must be held."

We earnestly and respectfully submit that the judgment should be affirmed.

E. S. PILLSBURY,
ALFRED SUTRO,
Attorneys for Defendant in Error.

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Pernau Bros. Print, 543 Clay St., S. F.

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REPLY BRIEF OF PLAINTIFF IN ERROR.

Upon the conclusion of the oral argument had in the above entitled cause on October 29th, 1901, counsel for plaintiff in error, obtained leave of this Court to file a brief in reply herein.

Counsel for defendant in error have devoted the first part of their brief to an examination of rules and authorities utterly inapplicable to the question of law, at this time sought to be raised by the plaintiff in error, with respect to the assignments leveling an attack at the special findings and the judgment based thereon. Neither in our opening brief, nor upon the oral argu-

ment, did we pray this appellate Court to review the character of the evidence, or to weigh the same. On both those occasions, as well as now, we pointedly maintained that there was *no evidence* to sustain certain special findings described in Specifications IX and X; and that the Court erred in its conclusion of law from them derived (trans. pp. 73–4, 77; op. br. pp. 8–9).

Obviously, this is altogether a different contention from the one argued at length by opposing counsel; and it will be considered on a writ of error in a case tried to the Circuit Court under a written stipulation waiving a jury. The law was so announced by this Court in the very recent case of *King* vs. *Smith*, 110 Fed. 95.

Dooley vs. *Pease*, 180 U. S. 126.

As intimated by opposite counsel, we assume that the Court below must find support for the obnoxious findings, assigned as error, in the letter of September 24th, 1897. Now, our position is not only warranted but sanctioned and sustained by the express ruling of the trial Court itself. We accept *in haec verba*, the assertion of counsel stated on page 30 of their brief: " The Court declared that in its opinion the letter of " September 24th, 1897, determined the liability of the parties." (See trans. p. 54.) " It appears, therefore, " that the trial Court did not consider the parol testi- " mony material or relevant."

The Court below by this express and unequivocal action taken during the progress of the trial established

two propositions safe beyond dispute here of either party to the controversy. Firstly, it thus decided that the letter of September 24th, 1897, coupled with the unconditional acceptance thereof by Wells, Fargo & Co., constituted the contract between the parties, to the exclusion of all else. Undoubtedly, the Court concluded that all the rest of the material and relevant evidence in the transcript simply touched the question of performance under the contract, after having reached the determination that the writing and its acceptance, constituted such contract. Secondly, it deemed the writing plain and unambiguous; in itself determining the engagement assumed by the plaintiff in error.

This ruling of the Court, to our minds, leaves open for consideration but one basic point. Did the trial Court err in its construction of this writing?

In our opening, we have fairly presented what we conceived to be the true and correct meaning of this writing. We then discussed the entire matter under the argument touching a review of Specifications 1, 2, 3, a, b and c (op. br. pp. 9–23). Having once fully considered this question in a review of certain assignments, it would have served no useful purpose to have repeated the argument in a mere formal way, while dealing with the remaining specifications relating to the special findings. In the best interests of brevity, it proved sufficient to direct the attention of this Court immediately to the one key question which lay at the entering threshold of the case at bar, knowing well that

the reasoning employed in the one instance would be properly applied to all other pointed specifications of error correctly assigned.

But the two reasons advanced by defendant, in order to uphold the correctness of the rule allowing the questions propounded to Mr. George E. Gray, as well as the answers given thereto, cannot prevail, in the light of the Court's decision that the writing determined the liability of the parties.

They urge as the first reason, that "the evidence of " witness Gray did not alter, or modify, or add to, or " contradict the letter of September 24th, 1897. It " simply explained the letter, and it was properly ad- " mitted under the rule that parol evidence is admissible " to explain a writing by a reference to the circumstances " under which it was made" etc. (deft's. br., pp. 9–13.) The rule, just stated, is well recognized. But, with deference, we urge that it has no application in the present instance. The absolute announcement of the trial Judge, above mentioned, supports us in our declaration that there was nothing in the writing requiring any explanation by a reference to *previous conversations between the parties.* And it is noteworthy, in no portion of their brief dealing with this branch of their case, have counsel indicated any specific part of the letter which the conversation "simply explained"—as they say. We submit, that the objectionable statement of Mr. Gray that he told Mr. Baker, "my object was to " get the *total* amount of cement we required" instead

of *explaining* a plain writing, and being consistent with it, tended [by this proof of circumstances (?)] to add to and vary it; and, indeed, to substitute a new and different engagement inconsistent with the one agreed upon in the writing itself. And the legal effect of a contract is as much within the protection of the rule which forbids the introduction of parol evidence as is its language (*Blake Mfg. Co.* vs. *Jaeger*, 81 Mo. App. 239; *Barry* vs. *Ransom*, 2 Kern. (N. Y.) 464.)

Reed vs. *Ins. Co.*, 95 U. S. 23, tendered as an authority on this point, by defendant in error, expressly approves of the old established doctrine that

> " A written agreement cannot be varied (by addition or subtraction) by proof of the circumstances *out of which it grew and which surrounded its adoption.*"

See also

Empire St. Co. vs. *Heller*, 61 Fed. 280;
N. Y. Life Ins. Co. vs. *McMaster*, 87 Fed. 63, 71;
Wrought Iron R. Co. vs. *Graham*, 80 Fed. 474;
Godkin vs. *Monahan*, 83 Fed. 116, 119;
Reid vs. *Diamond Plate Co.*, 85 Fed. 193;
Tuggle vs. *Callison*, 45 S. W. 291;
Minnesota Thresher Co. vs. *Grant Co*, 81 Mo. App. 255;
Dean vs. *Washburn etc. Co.*, 58 N. E. 162;
Rough vs. *Breitung*, 75 N. W. 147;
Janes vs. *Ferd Heim B'g Co.*, 44 S. W. 896;
Williams vs. *Hood*, 11 La. Ann. 113;
Barry vs. *Ransom*, 2 Kern. (N. Y.) 462.
Brite vs. *Mt. Airy M'f'g. Co.*, 39 S. E. 634.

They urge as the second reason for admitting the evidence, "because the letter refers to the conversation". They ask, "Could the trial Court have given the letter " a proper construction without evidence of the conver- " sation which the parties had in mind?"

In the first place, adopting the ruling of the Court, discussed on page 30 of their brief, to the effect that the letter determined the liability of the parties, it inevitably follows that the Court did not regard the previous conversation as material or relevant to the matter in hand. The Court, apparently, reached its own interpretation by a process of reasoning based upon the terms of the writing alone and similar to that adopted by counsel as set forth at pp. 18–24 of their brief, and which will receive, hereafter, proper attention. In the next place, for the sake of the argument, let us suppose, as counsel say, that " when Mr. Baker wrote " the letter he had in mind his conversation with the " witness Gray, and it was his deliberate intention that " the witness Gray, when reading the letter, should " have in mind and consider the conversation". We fail to comprehend how such a condition can avail anything in favor of the defendant in error. It would naturally follow therefrom, that the writer, having in mind such conversation and considering it, and reminding the other of it, takes pleasure in now submitting for acceptance, a specific quotation for as much as the other may require, *on* a stated number of barrels of cement, for use in a certain building; notwithstanding

the previous conversation had, relating to the subject. Thus, as suggested, such conversation becomes immaterial and irrelevant. Or, on the other hand, the phrase criticised must have been inserted simply to remind Mr. Gray that the writer, till that afternoon an utter stranger to him, was the identical person who had actually conversed with him concerning the cement, but a short time before the dictation of the letter.

We submit that either or both purposes are the only ones which can be fairly ascribed to the use of this introductory phrase; and in any event the conversation would be deemed immaterial and irrelevant.

But counsel argued strenuously, "that when a writ-" ing contained a reference to a conversation as a part of " the writing, evidence of the conversation is properly " admitted in an action involving the writing" (deft's. br. p. 14). They cite in support of this rule four cases, of which *Selig et al.* vs. *Rehfuss*, 45 Atl. 919, is the exemplar. Neither the rule, nor the cases offered in support thereof, are applicable to the one before this Court. We deny that the letter in question contains a reference to a conversation as a *part of the writing*.

In *Selig* vs. *Rehfuss*, *supra*, it appears that the letter began as follows.

"As per our conversation had with your Mr. Rehfuss " to-day, we confirm our order for ten more Pearl " Button Machines," etc.

Here plainly the parties had entered into a contract

of sale confirmatory of a particular conversation, and to conform with it. The facts of this case show that in the conversation, preceding the letter, the plaintiffs had expressed a fear lest the machines desired should prove an infringement upon a certain Cleret patent button machine. Thereupon Mr. Rehfuss, one of the defendants, told one of the plaintiffs, "You need have no fear of "that, we will guarantee that is not an infringe- "ment. We will sell you these machines and we will "guarantee them not to be an infringement of the "Cleret patent." Again, and at the same conversation, Mr. Rehfuss said, "My dear sir, we are expert "experimental machinists and have been in the busi- "ness a great many years. We know just exactly "what we are talking about; and we will guarantee "that this is not an infringement of the Cleret patent. "If ever these people bother you, send them to us and "we will fight them in the courts." The plaintiffs were sued for damages by the *Cleret* people on the ground of an infringement, and the case reported in *45 Atl., at 919*, was a subsequent action brought by *Selig et al.* to recover from Rehfuss et al. the amount of damages based upon an express warranty, *collateral* to the agreement of sale.

In its opinion in the case of *Selig* vs. *Rehfuss*, the Court said in its charge:

> "The writing is undoubtedly an order for the ten extra machines, and the mere fact that the

warranty is not written in the paper is not conclusive against the plaintiffs. The *law of Pennsylvania* does allow a collateral oral contract to be proved in the manner in which this has been attempted to be proved by the plaintiffs, so that you are at liberty to find notwithstanding the fact that the warranty is not in the paper, that such warranty was made if you believe from the evidence submitted to you that it was made."

The excerpt from the Court's charge set forth on pages 14 and 15 of the brief of defendant in error must be regarded along with that portion of the charge which we have taken the pains to insert here, as well as in connection with the particular facts of that case. When viewed in this added light it is clearly distinguishable from our own case.

The warranty sought to be proved was an independent contract and collateral to the contract of sale entered into between the parties. An independent and collateral contract is distinct and separate from the main contract of sale. It does not purport to vary, or contradict it. It stands altogether on its own footing. The principal case of *Selig* vs. *Rehfuss*, as is evident from the opinion, followed a preceding case in Pennsylvania, *Holt* vs. *Pie*, 120 Pa. St. 425. The letter in the latter case reads:

> "Confirming our verbal contract of some days ago, you will please enter the following order of good, sound hemlock lumber, etc."

The Court in that case decided:

> "So far as this order and acceptance express terms, they constitute the contract between the

> parties. They fixed the amount of lumber to be furnished, the size into which it is to be cut, the kind, and the price on the cars. But the order referred to a 'verbal agreement of some days ago' and professes to be in confirmation of it. It does not profess to cite that agreement, or be a substitute for it, but to confirm, or conform to it. The offer to prove what that verbal contract was as to any omitted terms or stipulations was not, therefore, an effort to change the terms of a written agreement but to show the whole agreement of which the letters were but part. * * *

The reason underlying the Pennsylvania decision is found declared in the case of *Schwab* vs. *Ginkinger*, 181 Pa. St. 8, in which the Court held that

> "Where a contract in writing shows *upon its face that it is not the whole contract between the parties, and does not purport to be a complete agreement*, parol evidence is admissible to show what was the whole contract and the same then becomes all parol."

Anderson et al. vs. *National Surety Company*, 46 Atl. 306, also a Pennsylvania case, is like the foregoing in all respects.

Ruggles vs. *Swanwick*, 6 Minn. 365, was an action brought to recover on a promissory note. The defendant interposed the defense of non-delivery and want of consideration. The Court held:

> "It may always be shown in defense of an action on a note in the hands of the original parties, that it was never perfected by delivery, or that there was no consideration moving between the parties to support it. * * * The verbal testimony in no way varies, or contradicts the writings. It sim-

> ply furnishes the whole of the transaction of which the writings form a part and are dependent upon for their meaning and just application. It shows these pretended notes *referred to in the writings, never had either consideration or delivery to support them as claims against the defendant, etc.*"

Durham vs. *Gill*, 48 Ill. 154, involves the question of agency growing out of a writing ambiguous and unintelligible but for the parol testimony introduced. The Court there said:

> "All that we hold is, that the letter in order to be intelligible at all, and in order to determine what Durham meant by it, and how it should have been understood by Gill, must be read and interpreted in the light of what had already occurred. Read by itself, it is incomplete and enigmatical. Durham says, 'The figure we spoke of, 72 and 75, would be satisfactory to me'. This would be unmeaning, if the previous conversations between the parties did not disclose the fact that they had constantly spoken of two offers to be obtained * * * There is no analogy between this and an attempt to explain a written contract by parol evidence. An agent may derive his power in part from letters and in part from verbal instructions, and when a hastily written letter refers to former conversasations and is *obscure* except for the light thrown upon it in such conversations upon the same subject, *and the question is as to the extent of the agent's authority under it*, it is indispensable that the jury, in order to accurately judge of the latter, should know of the extent of the authority previously conferred and its limitations."

No such confirmatory reference and no such questions as those considered in the foregoing cases can be found involved in the writing, dated September 24th,

1897. It is no term or condition of the present contract that the sale is made *as per* a conversation or *in confirmation* of it. There is no pretense on the part of opposing counsel that there existed a collateral and distinct contract of warranty assumed by the plaintiff in error. There is no argument advanced based on any non-delivery or want of consideration. To hold that every writing, no matter how plain and unambiguous, or what its subject may be, beginning "referring to the conversation" would open the door to the introduction of parol testimony, irrespective of the rest of the writing, is a dangerous doctrine which this Court will not approve, nor establish. Concerning a similar question, a sister tribunal in the case of *Godkin* vs. *Monahan*, reported in 83 Fed. 116, at page 119, declares:

> "We recognize the rule that parol evidence may be received of the existence of an *independent* oral agreement not inconsistent with the stipulation of the written contract in respect to which the writing does not speak, but not to vary, qualify or contradict, add to or subtract from the absolute terms of the written contract. The collateral agreement which may be proved by parol evidence must relate to a subject distinct from that to which the written contract applies. We believe these principles to be fully in accord with the rulings of the ultimate tribunal." (Here follow 15 citations from U. S. Supreme Court.)

Again at page 120 of the same decision, the Court speaks, referring to *The Poconoket case*, 70 Fed. 640:

> "The lower Court admitted the evidence upon the rulings of the Supreme Court of Pennsylvania, *which Court has gone to an extreme in the admis-*

sion of evidence to vary written agreements. The Court of Appeals approved the decree upon the strength of those decisions and of certain other cases cited, notably certain English cases, which are reviewed and disapproved in *Naumberg* vs. *Young*, *supra*. The law of a contract at the time it is made inheres in and becomes a term of the contract, and, it is settled, cannot be changed by subsequent legislation. Still less, as it seems to us, can the law of the contract be changed by parol negotiations incident to the writing. Such a verbal agreement does not relate to a *collateral* subject, to one distinct from that to which the contract applies, but to that which inheres in, and under the law, is a term of the contract, and part and parcel of it."

See *Jones on Evidence*, Secs. 444–5.

Another instructive case on this point is *N. W. Fuel Co.* vs. *Bruns*, 1 N. Dak. 137; s. c. 45 N. W. 699. The syllabus states:

"Defendant having written plaintiff asking if it could furnish defendant coal at same prices and terms as previous season, if he used about one-half or two-thirds of amount used the previous season, and plaintiff having, by letter, in answer to this inquiry, offered to sell at the price of $3.50 per ton, and defendant having thereafter, by letter, accepted the offer, *held*, that parol evidence to show that, intermediate plaintiff's offer and defendant's acceptance, the parties fixed the amount of coal to be delivered at the full amount used by defendant the season before, instead of one-half to two-thirds, as stated in defendant's letter, was inadmissible, because it varied the terms of the written contract."

The opinion of the Court, per Corliss, C. J. decided:

"The parties, therefore, stood in the position of

having drawn, but not signed, a proposed agreement, when the conversation as to the amount of the coal to be furnished was had. This conversation was at variance with the terms of this written but unsigned proposed agreement, and it was the duty of the defendant to see to it that this parol change was interpolated into the contract before finally assenting to it. This he did not do. He signed it as it was, by writing the letter of acceptance. This accepted an offer to furnish coal at a certain price, which offer was made on condition that the amount was to be about one-half to two thirds of the amount supplied defendant by plaintiff the season before. It did not accept an offer to furnish 951 tons of coal, nor was the contract silent as to the amount. If, after submission of a written agreement for approval the parties agree to change any of the terms of the writing, the change must be made in the writing, or it will be held to embrace the true agreement of the parties. In attempts to mete out justice in individual cases, so many distinctions have been made, in order to escape the force of the doctrine excluding all oral stipulations not embraced in a written contract, that the proper application of the rule has become a problem so difficult of solution that the value of the rule has been seriously impaired. The uncertainty which has resulted has given rise to much litigation in which each party has been sanguine of success because precedents to support each theory could be found. This is to be deplored, and it is wise that this Court should at the outset uphold this principle in its full integrity."

In re Howard, 100 Fed. 630;
South Boston I. W. vs. *U. S.*, 34 Ct. Cl. 174;
Shickle vs. *Chouteau Co.*, 10 Mo. App. 242;
Bass D. G. Co. vs. *Granite City Co.*, 39 S. E. 471;
Bullock vs. *Com. Lumber Co.*, 31 Pac. 367;

Carey vs. *Gunnison*, 65 Ia. 702;
Hand vs. *Miller*, 68 N. Y. S. 531;
Cook vs. *First Nat. Bank*, 90 Mich. 214.

We have heretofore addressed ourselves to a question of practice and rulings arising on the admission or exclusion of testimony. We have done so chiefly because we deem it our duty to regard separately each argument of defendant in error. We now propose to review its stand as to the true meaning of the contract obtained from the writing alone.

In their analysis of the letter counsel start with error. They apparently discover the essence of the engagement of William Wolff & Co., in that provision of the letter which is merely introductory to the determining words and controlling portions. They assert that the statement, "We take pleasure in submitting to " you our quotation on Alsen's German Portland Ce- " ment for use in the new Wells, Fargo Building, now " in course of construction" necessarily embraces— " not any part or portion of the building but the *entire* " building". In this they are plainly mistaken. The word *entire* does not appear in the original writing. They must interpolate it or an equivalent to reach the result contended for. As the sentence stands it covers any definite quantity of cement, just as pointedly as it covers cement *for the entire building*; for the cement would be actually for use in the new building, whether the amount engaged to be furnished by William Wolff & Co., turned out to be only sufficient for a part of the

structure, or for the whole of it.

This method of inserting new terms into the writing and of excising others therefrom, as well as the obnoxious course of excising words from one part and inserting them into another portion of the writing, gives to it a strained and forced construction, instead of the plain and natural one to which it is clearly entitled. The insufficiency of the reasoning as well as the fallacy of the method become obvious immediately if we subject similar language found in the writing of the *Budge case* to such an operation as defendant in error attempted on page 20 of its brief.

Applying by the same process, to the *Budge case*, the language of Mr. Justice Bradley in the *Brawley case*:

> "The contract was not for the delivery of any particular lot, or any particular quantity, but to deliver all mining timbers required and used by the party of the second part on the Broadwater mines lease at Neihart, County of Cascade, and State of Montana, during the year A. D. 1898, about 600 mining timbers and about 15,000 lagging.
>
> "These are the determinative words of the contract and the quantity designated, about 600 mining timbers and about 15,000 lagging, is to be regarded merely as an estimate of what the parties, making the contract at the time, supposed might be required. The substantial engagement was to furnish such an amount of mining timbers and such an amount of lagging as should be required by the party of the second part for use on the Broadwater Mines Lease at Neihart, County of Cascade, and State of Montana, during the year A. D. 1898."

Such words, therefore, as opposing counsel here deem to be the controlling and determining words of the contract are found used in the writing considered in the *Budge case.* If anything, the language employed in the writing of the latter case is stronger, for it reads: "*all* mining timbers required and used by the party of the second part," etc. Yet, the Court certainly did decide that a writing may contain *other* terms which in themselves would be determining words of the contract, so as to declare the true engagement of the respective parties. It follows, as a matter of course, that the mere use of such words as are emphasized by counsel does not in every instance define the obligation undertaken. In the *Budge case* the Court said:

> "The determining words of the contract are the quantities of timber which are specified in the defendant's promise to pay and not the words 'all mining timbers required and used' contained in the plaintiff's covenants. The contract was not one in which the quantity of material to be delivered rested wholly in the will of him who was to receive it, nor was it one of those in which the contracting parties had in mind the construction of a particular work and the supply of the necessary material therefor, the work itself furnishing to both parties the ultimate measure of the quantity which the contract contemplated."

The *Budge case* then, is an authority to the point that parties may mention a particular work in the writing, and yet it would not necessarily follow that such an expression would show conclusively that the parties had in mind the construction of a particular work and

the supply of the necessary material therefor, the work itself furnishing to both parties the ultimate measure of the quantity which the contract contemplated. In certain instances such an expression may be governed and controlled by other terms of the writing. Each particular case, it seems, must be decided in the light of the specific writing to be reviewed, applying the rules of law enunciated in the authorities.

Counsel for defendant in error say:

"It is clear, we submit, that the contract in the case " at bar falls within this third general rule" [of the *Brawley case*] (deft's br. p. 20).

In support of the construction given to the letter by the Court below, manifestly under the application of this third rule quoted, they then cite several cases. *Thurber* vs. *Ryan*, 12 Kan. 453, refers to a writing containing determining words of undoubted meaning, altogether absent from the case here; furthermore, it fails to show, as in this case, a supplemental limitation within whose extent the acceptor would have the sole right, freely to name the amount desired. This becomes straightway clear upon examination of the contract set forth and discussed in the Kansas decision (see pp. 457–8).

Pembroke I. Co. vs. *Parsons*, 5 Gray 589, is not in point, as it comes exclusively under the first rule of the *Brawley case*. The same may be said of *Navasso Guano Co.* vs. *Commercial G. Co.*, 93 Ga. 92; *Day Adm.* vs.

Cross, 59 Tex. 595; *Watts* vs. *Camors*, 115 U. S. 353, and *Havemeyer* vs. *Cunningham*, 35 Barb. 515.

In *Callmeyer et al.* vs. *The Mayor*, 83 N. Y. 116, the written agreement stated a distinct provision that the

> "Period of the contract was for six months, and the material must be delivered as called for by the requisitions of the treasurer." * * *

It was further stipulated

> "That the material shall be furnished 'according to the *specifications* and the *requirements* of the treasurer under them; and that payment shall be made on the certificate of the engineer that the quantities have been delivered as per requisition and in accordance with specification'."

In *Harrington* vs. *The Mayor*, 10 Hun. 248,

> "By the contract, the plaintiff was to furnish 'all the sand and broken stone, of the quality and quantity, in the manner and under the conditions specified'. * * * It was also provided that if the plaintiff failed to deliver, the defendant should have the power to purchase such quantity of material as might be necessary to fulfill the contract, or such part as the engineer might deem necessary. * * * The defendant extended it [the contract], and the plaintiff acquiesced."

In *Hackett* vs. *State*, 103 Cal. 144,—the notice to contractors under which plaintiff's bid was received read:

> "The whole of the material to be furnished and work to be done as required by the *plans and specifications*, to which special reference is hereby made."

The contract provided:

> "That the party of the second part hereby cove-

nants and agrees with the party of the first part to furnish the labor and materials, and do the following work, to-wit:—*The construction of section five of the seawall and thoroughfare and wharf* along the water-front line of the City and County of San Francisco, State of California."

The specifications stated:

"The work to be done under these specifications consists in *furnishing all materials* and *erecting* a *stone* embankment, an *earth* embankment, and a *wharf*."

In *Tancred, Arrol & Co.* vs. *Steel Co. etc.*, 15 App. Cas. 125, the determining words of the agreement, "to "supply the whole of the steel required by you," plainly state an engagement under which the receivers of the material were bound to take from the suppliers named, all the steel required in the construction of a certain work. Without regard to previous conversations, the Court declared that the express language of the writing itself, plainly entitled the Steel Co. to furnish all the steel required in the contemplated and designated work; and consequently held Tancred, Arrol & Company to the payment of damages in favor of the Steel Company.

The question here is, Does the writing in question, *taken by itself*, state an engagement which would have compelled Wells, Fargo & Co., to receive from Wm. Wolff & Co., *all* of the cement required in the construction of its new building, in case the price of cement had fallen? And that, too, even if Wells, Fargo & Co. had, in good faith, changed the plans and specifications of

the structure, thereby increasing its height or width, or enlarging it in other respects, so as to use fourfold or tenfold the amount specifically enumerated. For the letter, to have the meaning for which opposite counsel contend, this much must be allowed; otherwise there would be entirely lacking a reciprocity of obligation on the part of Wells, Fargo & Company. With all deference, we submit, that the writing now considered, of itself, did not impose any such burden upon the defendant in error, and that its terms and conditions could not have entitled the suppliers of this brand of cement to furnish the whole of the special material required in the construction of the new building, whether erected as originally contemplated or, in good faith, altered to suit the necessities of a rapidly growing business. It will be remembered that no plans or specifications were ever exhibited or brought to the notice of any one connected with Wm. Wolff & Co.

Upon the oral argument, counsel apologizing for transgressing the record, suggested to this Court, that at the trial they stood ready to show that the defendant in error would have purchased (?) additional cement, if prices had fallen, but that the Judge below, upon objection, ruled against the admission of any such testimony. Obviously, such hidden and self-serving mental operations have no place in evidence. Without further comment in that direction, we simply quote from a recent opinion rendered by Chief Justice Parker in the Court

of last resort for the State of New York:

> " In the first place, the question did not call for a fact, but instead for a mere operation of the witness' mind, the secret, undisclosed intent of the witness in the event of the presentation of a situation calling for action * * * it sought merely to elicit from him his secret mental operation, which was safely beyond contradiction—such evidence is not admissible."
> *Saxe* vs. *Penokee L. Co.*, 159 N. Y. 371, 380.

We have thus carefully examined and reviewed the several authorities offered by defendant in error to sustain the construction given to the letter by the Court below. They fail to achieve the purpose intended, and leave this Court to apply the second general rule of the *Brawley case* and the authorities invoked on behalf of plaintiff in error, to the letter in hand.

We have been charged with entirely ignoring the expression, " for use in the new Wells, Fargo Building " now in course of construction," in the first paragraph of the letter, and "for what you may require", in the second paragraph (deft's. br. p. 18). A reference to our opening brief fails to sustain the assertion; and, besides, makes it strikingly clear that by our interpretation some force and effect is given to every word in the writing without any interpolation or elimination, or any transposition of terms from their original and natural place to convey a desired meaning.

The interpretation offered by plaintiff in error stands as the *one* true construction; for it is not at variance

with the collocation of the words used, nor with the natural arrangement of the respective parts of the letter, and gives, furthermore, each and every word purposefully employed its own common sense and well settled legal meaning. Construed from this practical point of view, the introductory part of the letter tends simply to identify the writer by reference to an incidental circumstance, not to be deemed an essential term or condition of the engagement, embraced in the quotation which followed in the second paragraph, or stating provision of the writing.

The stating part alone contains language of contract; and, therefore, it is, naturally, to be expected that it would set out the determining words of the agreement.

These, we respectfully submit, granted Wells, Fargo & Co. the right freely to name the quantity within the limitation expressly and carefully mentioned. Some meaning must be attached to the supplemental language, "*on* about 5000 barrels (5000) " more or less," without doing violence to the writing taken as a whole. No effect will be given it at all, unless it be considered in connection with the phrase immediately preceding, "for what you may require". And when so regarded, it unquestionably qualifies a general and sweeping right; which, otherwise, would have placed the one party entirely within the power of the other. So long as the limiting term "on" was intentionally inserted in the position where the completed letter left it, this Court, we submit, will not hold that

"*on* about five thousand barrels, etc.", is merely an estimate of what the parties supposed would be needed, without bearing upon the engagement undertaken by the suppliers. We think the writing readily and fairly comes under the second general rule of the *Brawley case*, and described an obligation on the part of Wm. Wolff & Company to maintain, as it states, a fixed price for the cement *on* about five thousand barrels. Upon fulfilling the demands of Wells, Fargo & Co., for deliveries up to the *specified* amount, both parties then occupied an equal position to enter into new and further engagements respecting the article indicated.

For the foregoing reasons, we respectfully pray a reversal of the judgment.

VOGELSANG & BROWN,
Attorneys for Plaintiff in Error.